90-1425

Supreme Court, U.S.
FILED
MAR 1 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

v.

CRAIG WILLIAM REEVES, *Respondent*

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

TIM CURRY
District Attorney
Tarrant County, Texas

C. CHRIS MARSHALL
Assistant District Attorney
Chief, Appellate Section
COUNSEL OF RECORD

Tarrant County Justice Center
401 W. Belknap
Ft. Worth, TX 76196-0201
817/884-1688

Attorneys for Petitioner

QUESTION PRESENTED

Respondent's conviction was supported by sufficient evidence as measured against the instructions actually given to the jury, but those instructions improperly allowed a conviction on a theory broader than that encompassed by the indictment.

Do *Jackson v. Virginia* and *Greene v. Massey* require an acquittal on appeal, as the Court of Criminal Appeals held, because the evidence is insufficient measured against the theoretically correct but narrower instructions which should have been given?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS, *Petitioner*

vs.

CRAIG WILLIAM REEVES, *Respondent*

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas.

OPINION BELOW

The opinion of the Court of Criminal Appeals is not yet published in S.W.2d. It is reproduced in the Appendix at A-1.

JURISDICTION

The Court of Criminal Appeals rendered its decision on September 12, 1990. The State timely filed a motion for rehearing

on September 27, 1990, which was overruled on January 30, 1991. Jurisdiction in this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Controlled Substances Act, Tex. Health & Safety Code Ann. §481.113(a,c) (Vernon 1991) (formerly art. 4476-15, §4.032 (a,c), Texas Revised Civil Statutes):[1]

> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 2.
>
> . . . .
>
> (c) A person commits an aggravated offense if the person commits an offense under Subsection (a) and the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 28 grams or more.

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[1] At the time of the offense, the Texas Controlled Substances Act appeared in the Revised Civil Statutes. The Act has since been codified in the Health & Safety Code with minor non-substantive changes in phrasing. For the Court's convenience, we will cite to the current code.

Texas Controlled Substances Act, Tex. Health & Safety Code Ann. §481.103(a) (3) (Vernon 1991) (formerly art. 4476-15, §4.02(c) (3), Texas Revised Civil Statutes):

(a) Penalty Group 2 consists of:

. . . .

(3) unless specifically excepted or unless listed in another Penalty Group, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant or stimulant effect on the central nervous system:

Amphetamine, its salts, optical isomers, and salts of optical isomers . . . .

STATEMENT OF THE CASE

A jury convicted Respondent of aggravated delivery of a controlled substance. The intermediate appellate court found the verdict was supported by the evidence, measured against the plain meaning of the instructions used by the jury to decide guilt. The Court of Criminal Appeals concluded that the jury's instructions allowed conviction on a different and broader theory than that encompassed by the indictment. Rather than awarding Respondent a new trial due to this instructional error, the Court of Criminal Appeals, relying on its understanding of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), ruled the evidence insufficient and ordered an acquittal because the evidence did not conform to instructions which, in retrospect, should have been given to the jury.

The evidence

Respondent Reeves met with undercover police officers in November 1985 to discuss selling them amphetamine in return for laboratory glassware and chemicals which could be used to

manufacture that substance. The officers asked to buy two ounces of amphetamine. Reeves agreed. However, he had only "wet" amphetamine which he said might weigh no more than an ounce and a half dry. He promised to make good any shortfall below two ounces.[2] Reeves handed over the damp powder in a sandwich baggie, and the officers turned over the glassware and precursor chemicals. R. III-29,83, 88-94; IV-127, 176. ("Wet amphetamine" is a "final completed stage" of manufacture. R. III-90-91.)

When the powder was analyzed in the police laboratory several months later, it weighed 29.7600 grams, about a gram less than when first checked into the lab. R. IV-203, 212, 215-16. Substances can lose weight in the lab due to evaporation. R. IV-211.

The powder tested positive for amphetamine based on a qualitative examination. The exact purity was unknown since no quantitative test had been performed. R. IV-228-29.

The indictment, jury instructions, and verdict

The indictment alleged that Reeves delivered amphetamine "of more than twenty-eight grams, but less than four-hundred grams." R. I-3; Opin. at A-1. In accordance with the law as it was understood at the time of trial and without objection by the defense, the jury was instructed that the "weight of the amphetamine is determined by *its aggregate weight including any adulterants or dilutants*, if any." R. I-25 (emphasis added); IV-232; see Opin. at A-7. See also, Controlled Substances Act, Tex. Health & Safety Code Ann. §481.113(c) (Vernon 1991).

The prosecution argued to the jury, also without objection, that in light of this instruction, "[y]ou don't have to separate out what is pure amphetamine," and that Reeves was responsible for

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[2] The opinion states that Reeves promised to provide more amphetamine if the dry weight was under two *grams*. Opin. at A-2. That is a mistake. The undisputed testimony was that Reeves promised to cure any shortfall under two *ounces*. One ounce equals approximately 28 grams. R. III-123

the "entire weight of this package." R. IV-238; Appendix at A-19. The jury found Respondent guilty as charged.

The appeal to the Court of Appeals

On appeal to the Court of Appeals for the Second Court of Appeals District of Texas, Reeves challenged the sufficiency of the evidence to support his conviction. He argued that since the indictment had not included a reference to the weight of adulterants and dilutants, the prosecution was limited to proof of a pure amount of amphetamine over 28 grams and that the evidence would be insufficient under that theory. Brief of Appellant in Ct.App., pp.2-4.[3] Reeves did not argue that the evidence was insufficient if the weight of adulterants and dilutants could be considered, nor did he directly challenge the instructions which allowed the jury to consider the weight of adulterants and dilutants.

The State denied that the indictment required proof of a pure amount of drugs, but added that in any event the sufficiency of the evidence should be measured in light of the instructions actually given the jury -- instructions which allowed the jury to consider an aggregate weight including adulterants and dilutants. State's brief in Ct.App., p.8.

The Court of Appeals agreed that the State could rely on the weight of both the pure drug and any adulterants and dilutants, and it summarily held the evidence sufficient under that theory. *Reeves v. State*, 743 S.W.2d 362, 363-64 (Tex. App. -- Fort Worth 1987). Appendix at A-13-14.

Discretionary review by the Court of Criminal Appeals

The Court of Criminal Appeals initially refused Reeves' petition for discretionary review on the sufficiency question, but

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[3] Reeves had not raised that issue by motion for instructed verdict or motion for new trial, but under Texas procedure that does not bar his complaint on appeal. *Flanary v. State*, 166 Tex. Crim. 495, 315 S.W.2d 897 (1958).

later granted rehearing. At the petition and merits stages, both Reeves and the State maintained the positions they had urged in the court of appeals. Appellant's petition, pp. 4-5; Appellant's mot. for rehearing, p. 1; Appellant's brief on merits, pp. 3-4. State's reply to petition, pp. 2-3; State's brief on merits, pp. 2-3.

The Court of Criminal Appeals overturned the lower court's ruling concerning the scope of the indictment and held that the charging instrument did not encompass proof of the weight of adulterants and dilutants since reliance on those substances had not been alleged.[4] Opin. at A-3-4,10. This was the first time the Court of Criminal Appeals had ruled on this issue.

As a prelude to its sufficiency review, the court held in conformity with previous decisions that *Jackson v. Virginia* contained the standard for judging the sufficiency of the evidence. It then added:

> Furthermore, this standard must be applied to the evidence and *to a correct charge that corresponds to the indictment allegations*. Benson v. State, 661 S.W.2d 708 (Tex.Cr.App. 1982), reh'g denied; Boozer v. State, 717 S.W.2d 608 (Tex.Cr.App. 1984), reh'g denied.

Opin. at A-5-6 (emphasis added). *Benson* and *Boozer* were likewise explicitly based on the court's understanding of *Jackson v. Virginia*, *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). See *Benson v. State*, 661 S.W.2d 708, 714-17 (Tex. Crim. App. 1982), *cert. denied*, 467 U.S. 1219 (1984); *Boozer v. State*, 717 S.W.2d 608, 611-12 (Tex. Crim. App. 1984).

The Court of Criminal Appeals then applied *Jackson's* rational fact-finder test to what would have been a correct charge to the jury (i.e., a charge allowing conviction only on proof of a

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[4] The reach of the indictment being a question of state law, we of course do not challenge this part of the Court of Criminal Appeals' decision.

pure amount of amphetamine over 28 grams). It found the evidence insufficient. The court focused on the absence of a quantitative analysis of the powder, which left the chemist unable to express an opinion on purity. Opin. at A-7-9. Despite using this measure of sufficiency, the court maintained that it was not addressing a question of error in the jury charge. Opin. at A-7n.4.

Acknowledging the State's argument that sufficiency should be measured against the instructions actually given to the jury, the court noted that the jury charge allowed adulterants and dilutants to be considered in determining weight. While not agreeing that sufficiency should be measured against those instructions, the court said the evidence would be insufficient even under that theory. Opin. at A-7,10.

However, in so holding, the court applied a restrictive definition of *adulterants and dilutants* that had not been announced until 1988, over a year after Reeves' trial in January 1987. In the 1988 decision, the Court of Criminal Appeals held that *adulterants and dilutants* did not encompass all impurities in the material containing the controlled substance, but only items added to the controlled substance with the intent to increase the bulk or weight of the final product. *McGlothlin v. State*, 749 S.W.2d 856, 859-61 (Tex. Crim. App. 1988).[5] The court said there was no proof in Respondent's trial that any impurities fit the *McGlothlin* definition since there was no specific evidence identifying other substances in the powder. Opin. at A-5,10. In essence, the court merely applied a variation of its basic "correct instruction" analysis, focusing on what in retrospect the jury should have been required to consider.

In light of its finding of insufficient evidence, the court reversed the judgments of the lower courts and ordered the entry of

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[5] Reeves first cited *McGlothlin* in his brief on the merits in the Court of Criminal Appeals, but he did not argue that the new definition of *adulterants and dilutants* should be applied to his appeal, much less that an application of the new definition would render the evidence insufficient. Appellant's brief on merits, p. 3.

a judgment of acquittal, two judges dissenting without opinion.[6]

The State timely filed a motion for rehearing, again arguing that sufficiency under *Jackson v. Virginia* should be judged against the instructions actually given, which would have meant judging sufficiency against the meaning the jurors could reasonably have given to the instructions, not the technical definition or other restrictions they had never been told to apply. We explicitly noted that the *McGlothlin* decision was issued after Respondent's trial. The State also pointed out that lay jurors could reasonably have understood *adulterants and dilutants* to mean any type of impurity which a drug dealer passed on with the product, thus rendering the evidence clearly sufficient. State's motion for rehearing, pp. 1-2, 6-21 (excerpts in Appendix at A-16).

The Court of Criminal Appeals overruled the State's motion for rehearing without opinion, one judge noting his dissent. The court stayed issuance of its mandate for 90 days, pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THE QUESTION PRESENTED HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT, THE ISSUE IS AN IMPORTANT ONE WHICH THIS COURT SHOULD RESOLVE. THE COURT OF CRIMINAL APPEALS HAS DECIDED THE QUESTION IN A WAY WHICH CONFLICTS IN PRINCIPLE WITH NUMEROUS DECISIONS OF THIS COURT.

Since 1982, Texas courts have been struggling with the proper

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[6] The appellate entry of a judgment of acquittal in such a situation has been standard since the decisions in *Burks v. United States* and *Greene v. Massey*. *E.g.*, *Herndon v. State*, 787 S.W.2d 408, 410 (Tex. Crim. App. 1990); *Johnson v. State*, 571 S.W.2d 4, 6 n.2 (Tex. Crim. App. 1978) (in light of *Burks* and *Greene*, Texas statute declared unconstitutional to the extent it provided for new trial after reversal for insufficient evidence).

application of *Jackson v. Virginia's* rational fact-finder test when the jury has decided the case under erroneous instructions. The dispute has concerned whether sufficiency of the evidence should be measured against a set of correct instructions, against the instructions actually given, or simply against the penal statute invoked by the indictment.[7] By choosing the first option, the Court of Criminal Appeals here converted what should have been a fairly routine inquiry into "trial error" in the instructions (error which at most would have entitled respondent to a new trial) into a finding of "insufficient evidence error" which has unjustly awarded him an acquittal.

The importance of this question is hardly limited to Texas. Criminal cases are all too often submitted under erroneous instructions, and appellate courts frequently announce unforeseeable narrowing constructions of criminal statutes. Much mischief can result if these occurrences require reversals for insufficient evidence and an accompanying bar to retrial when a case is submitted to the jury under a factually supported but legally flawed theory.

A. The Court of Criminal Appeals has taken *Jackson v. Virginia's* reference to a "properly instructed trier of fact" out of context.

The State attacks an erroneous interpretation of *Jackson v. Virginia* that began in *Benson v. State*, 661 S.W.2d 708 (Tex. Crim. App. 1982), *cert. denied*, 467 U.S. 1219 (1984). Focusing on *Jackson's* repeated use of the phrase "properly instructed trier of

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[7] Though not acknowledging the third option in this case, the Court of Criminal Appeals said that factually the State had proven an aggravated delivery under the statute. Since Penalty Group 2 of the Controlled Substances Act encompasses "a[ny] mixture" that contains "any quantity" of amphetamine (see Tex. Health & Safety Code §481.103(a)(3)), Respondent had indeed delivered over 28 grams of a Penalty Group 2 substance because the powder he sold contained at least some amphetamine. However, the court said the State could not rely on that theory since it had not pled the "any mixture" language. Opin. at A-10n.5.

fact," the Court of Criminal Appeals concluded that *Jackson's* rational fact-finder test must be applied in light of a "correct charge that corresponds to the indictment allegations." *Benson v. State*, 661 S.W.2d at 714-15, and concurring opinion at 716-17. (*Benson* is also a case in which the Court of Criminal Appeals applied a narrowing definition of a term to the sufficiency of the evidence at a trial conducted before the restrictive definition was announced. *Id.*, 661 S.W.2d at 720-21 (dissenting opinion).) The opinion below cites *Benson* as the authority for the sufficiency review undertaken in Respondent's case. Opin. at A-6. The Court of Criminal Appeals has recently reaffirmed that the "proper instruction" language of *Jackson v. Virginia* underlies the decision in *Benson* and that absent that foundation *Benson* "must lose legitimacy." *Arceneaux v. State*, No. 1092-87, slip op. at 4 n.3 (Tex. Crim. App. Oct. 24, 1990) (not yet reported) (Westlaw cite: 1990 WL 160386).

The Court of Criminal Appeals has relied on language in *Jackson v. Virginia* which it has taken out of context. This Court referred to a "properly instructed" trier of fact at least three times in *Jackson v. Virginia*:

> The *Winship* doctrine required more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. [fn 8] A "reasonable doubt," at a minimum, is one based upon "reason." [fn 9 omitted] Yet a **properly instructed jury** may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury . . . .
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>
> 8. The trier of fact in this case was a judge and not a jury. But this is of no constitutional significance. The record makes clear that the judge deemed himself **"properly instructed."**
>
> . . . .

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was **properly instructed**, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt . . . .

Jackson v. Virginia, 443 U.S. at 317-18, 99 S.Ct. at 2788-89 (emphasis added).

In referring to a "properly instructed" jury, this Court was merely responding to (and rejecting) cases mentioned earlier in the opinion in which lower federal courts had said that no sufficiency review was required beyond the weak no-evidence test of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), as long as the jury had been properly instructed on the requirement of proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 316, 99 S.Ct. at 2787. We do not believe the Court was sending a signal that sufficiency is weighed against what a "properly instructed" jury would have been told about every aspect of the case, without regard to the actual instructions, but that is apparently what the Court of Criminal Appeals thought.

Granting review would clear up a misunderstanding which has led the Texas courts to grant insufficient evidence acquittals in cases in which the actual error, if any, lay in "trial error" jury instructions. *See Burks v. United States*, 437 U.S. at 15, 98 S.Ct. at 2149.

B. The decision of the Court of Criminal Appeals conflicts in principle with *Lockhart v. Nelson* and *Cole v. Arkansas*, both of which suggest that sufficiency is measured against the instructions given the jury.

In *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), the Court held that even if a conviction must be reversed due to the erroneous admission of evidence, a court

reviewing the sufficiency of the evidence is required to consider all the evidence actually admitted. The defendant is not entitled to an acquittal even if the evidence would have been insufficient absent the challenged evidence. Excising the improperly admitted evidence from the sufficiency review would be unfair since had the trial judge ruled correctly in the first place, the prosecution might have offered other evidence on the point. *Id.*, 488 U.S. at 42, 109 S.Ct. at 291.

If the sufficiency of the evidence must be reviewed under the evidence actually admitted, so should it normally be reviewed under the jury instructions actually given. In marshaling its proof, the State should be entitled to rely on the judge's ruling concerning the issues which are necessary for guilt, just as it should be entitled to rely on the judge's ruling concerning admissibility of the evidence. In both situations, the prosecution might have offered different proof had the trial judge ruled that different issues were legally significant. (Although the jury instructions are the final embodiment of the issues the State must prove under the court's rulings, judges may indicate their understanding of those issues before the instructions are actually given to the jury, such as when rulings are made on the sufficiency of the indictment or on the relevancy of evidence, or at pre-trial charge conferences.)

Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 920 L.Ed. 644 (1948), suggests the same. There, the defendant was convicted under an indictment charging a violation of section two of a criminal statute. The Arkansas Supreme Court, refusing to pass on the challenges to the conviction under section two, upheld the conviction on the theory that a crime had been proved under section one of the act. This Court reversed, holding that it was a denial of due process to uphold a conviction on a theory not alleged and presented to the fact-finder:

> . . . .To conform to due process of law, petitioners were entitled to have the validity of their convictions

> appraised on consideration of the case *as it was tried and as the issues were determined in the trial court*.

Cole v. Arkansas, 333 U.S. at 202, 68 S.Ct. at 517 (emphasis added). Thus, just as the defendant in *Cole* was entitled to have his conviction reviewed "as [the case] was tried and as the issues were determined in the trial court," so too should the prosecution be entitled to have sufficiency determined under the same standard -- under the jury charge actually given.[8]

The Court should grant review to consider the extent to which the rationale of *Lockhart* and *Cole* apply to a sufficiency review when the jury decides guilt under erroneous instructions.

C. The decision of the Court of Criminal Appeals conflicts in principle with *Montana v. Hall* and *McNally v. United States*, both of which suggest that Respondent suffered mere "trial error," entitling him to a new trial but not an acquittal.

In *Montana v. Hall*, 481 U.S. 400, 403-04, 107 S.Ct. 1825, 1827, 95 L.Ed.2d 354 (1987), the defendant was charged, tried, and convicted of incest with his stepdaughter. On appeal, the parties discovered that the incest statute had not been in effect at the time of the conduct. The state court reversed since upholding the conviction would amount to approving an ex post facto law. The state court also ruled that a retrial on sexual assault charges

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[8] Although not considering the sufficiency of the evidence at the time, the Court has said that in examining jury instructions a court must ask how a reasonable jury "could have understood" the charge. *Francis v. Franklin*, 471 U.S. 307, 316, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985); *Cage v. Louisiana*, 111 S.Ct. 328, 329 (1990). Here, reasonable jurors could have understood the phrase *adulterants and dilutants* to include any sort of impurities. They surely would not have understood those terms to carry the narrow definition announced over a year later in *McGlothlin*.

would be barred under the Double Jeopardy Clause, relying primarily on the idea that a new trial for sexual assault would involve a prohibited second trial for the same offense, but alternatively on the notion that a retrial would be barred because the defendant was convicted of a crime which "did not exist" on the date of the charged offense.

This Court summarily reversed the state court's jeopardy ruling. The gist of the decision was that the state court was attempting to bar retrial after an appellate reversal for reasons unrelated to a finding of insufficient evidence to support the conviction, the latter being the only instance in which there could be a double jeopardy bar. The Court rejected the claim that conviction for a "non-existent offense" barred retrial, noting the defendant's conduct was criminal and the state merely "relied on the wrong statute" in the information. The Court observed that retrial is permissible after a reversal for a defect in the charging instrument.

In *McNally v. United States*, 483 U.S. 350, 361, 107 S.Ct. 2875, 2882, 97 L.Ed.2d 292 (1987), the Court announced that the mail fraud statute did not prohibit schemes to defraud citizens of intangible rights to honest and impartial government. Although the intangible rights theory was the only one presented to the jury, the Court nowhere intimated that the issue before it was one of insufficient evidence. Rather, it reversed for erroneous instructions which allowed the jury to convict for conduct not within the reach of the mail fraud statute. *See also Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (new trial ordered due to variance allowing conviction on theory broader than that alleged in indictment).

Under these decisions, where the case is submitted to the jury under a flawed legal theory but that theory is nevertheless supported by the evidence, there is generally no bar to reprosecuting the defendant under the correct theory when the case

is reversed for error in the indictment or charge.[9]

If we interpret these cases correctly, they also cast grave doubt on the decision below and suggest the need for review.

II. THE DECISION OF THE COURT OF CRIMINAL APPEALS CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. TWO JUSTICES VOTED TO GRANT CERTIORARI IN THE LATTER, INDICATING THE IMPORTANCE OF THIS ISSUE.

The Sixth Circuit has adopted an approach like the one we suggest in *United States v. Davis*, 873 F.2d 900 (6th Cir.), *cert. denied*, 110 S.Ct. 292 (1989). The defendant's mail fraud conviction was reversed following *McNally*. Attempting to bar his retrial, he argued that the courts should review the evidence in the first proceeding, tried only under an intangible rights theory, to see if that record would have supported a conviction for traditional mail fraud. The Sixth Circuit rejected that idea because it would be unfair to judge sufficiency at the first trial under traditional mail fraud concepts when the case had not been tried on that theory. *United States v. Davis*, 873 F.2d at 907-08. The court also held that the original reversal was not equivalent to an acquittal. Relying on *Montana v. Hall*, among other decisions, the court held that the reversal was for trial error -- a defective indictment -- and that retrial was not barred. The court also noted that to bar retrial would have unfairly punished the government since the prosecutors had reasonably relied on the intangible rights theory at

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[9] The State conceded in its motion for rehearing that to the extent the jury charge allowed a conviction on a theory broader than that encompassed by the indictment, Respondent would likely be entitled to a new trial due to serious instructional error. State's mot. for rehearing, p. 17; first supplement, pp. 1-2. As noted, the Court of Criminal Appeals had refused to examine possible error in the jury charge. Opin. at A-7n.4.

trial. *United States* v. *Davis*, 873 F.2d at 903-06.

The reasoning in Davis coincides with that suggested by the State here. However, Justices White and Blackmun noted that they would grant certiorari in *Davis*. *Davis* v. *United States*, 110 S.Ct. 292 (1989). Question two in that petition was similar to the one presented here. See *Davis* v. *United States*, 58 U.S.L.W. 3161 (U.S. Sept. 19, 1989) (#89-67). The interest of two Justices in the issue is a further indication that review is appropriate. Similarly, Justice Marshall's recent analysis of a state court decision seeming to misconstrue *Montana* v. *Hall* demonstrates the need for additional guidance in this area. See *Parker* v. *Arkansas*, 111 S.Ct. 218 (1990) (dissent to denial of certiorari).

III. STATE COURTS OF LAST RESORT HAVE ISSUED CONFLICTING DECISIONS CONCERNING THE QUESTION PRESENTED.

At least five other state courts of last resort have addressed a question like that raised here. They are split three to two on the proper approach under the Constitution.

The highest courts of Louisiana and Arkansas have followed the approach we suggest -- measuring sufficiency against the theory of the case as it was tried and submitted.

In *State* v. *Morris*, 397 So.2d 1237 (La. 1980), the case was given to the jury on the theory, accepted by all parties at trial, that a second-degree murder required proof of a "specific intent" homicide. In fact, second-degree murder required proof of a killing during the commission or attempted commission of certain specified felonies. No proof was offered concerning the latter, unsubmitted theory, and the defendant argued that the resulting insufficiency barred a retrial in light of *Burks* v. *United States*. The Louisiana Supreme Court disagreed and held this mere trial error due to an erroneous indictment and jury instruction, effectively refusing to judge sufficiency against the instructions which should

have been given. *State v. Morris*, 397 So.2d at 1251-52.

The Supreme Court of Arkansas reached a similar result in *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987). In seeking to establish previous convictions as a basis for enhancing punishment, the prosecution, relying on the judge's ruling that the legally relevant date was the date on which the conviction occurred and not the date of the criminal conduct itself, proved up only the former. The appellate court accepted the defendant's argument that the relevant date was the commission of the offense, but it denied that *Burks v. United States* barred a retrial due to the absence of proof regarding that date. The court held that based on the trial judge's incorrect ruling, this was trial error, again rejecting the idea that a *Jackson-Burks* sufficiency review should be measured against what would have been the correct legal theory applicable to the case. *Rogers v. State*, 738 S.W.2d at 413-14. (Since this was a trial to the court, the judge's ruling on relevancy was the equivalent of an instruction to the jury concerning the date which the prosecution was obligated to establish.)

On the other hand, several states have measured sufficiency against the theoretically correct instructions which should have been given, but those courts avoided awarding acquittals on appeal since the evidence was adequate even under the unsubmitted theory.

In *Phillips v. State*, 541 N.E.2d 925, 926 (Ind. 1989), the trial judge's instructions erroneously allowed the jurors to adjudicate the defendant an habitual criminal if they concluded that any two prior convictions were proven, rather than by requiring them to find that the previous convictions occurred in a certain sequence. The court held that this was a case of trial error and not insufficient evidence, citing *Burks v. United States* and *Lockhart v. Nelson*, but in deciding the sufficiency question the court looked to the theoretically correct law which had never been given to the jury, noting that "[a] jury properly instructed on the required sequence could have found" the defendant an habitual offender. *Phillips v.*

State, 541 N.E.2d at 926.

Nebraska adopted a similar approach in *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435, 439, 442-43, 446 (1989), holding that an improperly broad definition of "pecuniary loss" constituted only trial error under *Burks* and *Lockhart*, but the court then weighed sufficiency against the narrower definition the jury should have been given.

Likewise, in *People v. Hayes*, 276 Cal.Rptr. 874, 802 P.2d 376 (1990), the jury was given an erroneous instruction concerning the taking of property from the robbery victim's "immediate presence." The instruction focused on whether the victim perceived any overt act connected with the offense (including the use of force), thus equating the "immediate presence" and "force and violence" elements of the crime. The instruction should have focused on whether the property was taken from a location over which the victim exercised some physical control. *People v. Hayes*, 802 P.2d at 406-07. After identifying this instructional error, the court measured sufficiency against the proper but unsubmitted definition of "immediate presence," citing *Burks v. United States*. *Id.* at 409-10.[10]

These decisions demonstrate that Texas is not alone in struggling with the relationship between the sufficiency test of *Jackson v. Virginia* and the jeopardy aspects of *Burks v. United States* and *Greene v. Massey*. Granting review would enable the Court to clarify the law and resolve the conflicts.

CONCLUSION

Had the sufficiency of the evidence been measured against the

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[10] One federal appellate decision has used a similar analysis. In *United States v. Marolda*, 648 F.2d 623, 624-25 (9th Cir. 1981), the court confronted a jury charge that omitted an element of the crime. Despite the fact that the jury had not been called on to decide whether that element was proven, the court barred a retrial since there was no proof of that element in the record. It cited *Jackson v. Virginia* and *Burks v. United States*.

plain meaning of the instructions given to the jury, the evidence undoubtedly would have been held sufficient in Respondent's case. The intermediate court of appeals had found it so, and Respondent himself never argued otherwise. The Court of Criminal Appeals reached a contrary conclusion only by measuring sufficiency against more stringent standards than were required by the instructions under which the jury labored. Although Respondent may well be entitled to a new trial due to error in the jury charge, he was not entitled to an acquittal.

For these reasons, a writ of certiorari should issue so this Court may review the decision below. The misinterpretation of *Jackson v. Virginia*, *Greene v. Massey*, and *Burks v. United States* seems so clear that a summary disposition may be appropriate.

Respectfully submitted,

TIM CURRY
District Attorney
Tarrant County, Texas

C. CHRIS MARSHALL
Assistant District Attorney
Chief, Appellate Section
Counsel of Record

APPENDIX

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

CRAIG WILLIAM REEVES, Appellant

V. No. 249-88

THE STATE OF TEXAS, Appellee

Delivered September 12, 1990

OPINION ON APPELLANT'S MOTION FOR REHEARING AFTER PETITION FOR DISCRETIONARY REVIEW REFUSED

A jury convicted appellant of the offense of unlawful delivery of amphetamine of an aggregate weight, including adulterants and dilutants, of more than 28 grams but less than 400 grams. See TEX. REV. CIV. STAT. ANN. art. 4476-15, sec. 4.031(a) and (c), (Vernon Supp. 1988).[1] Upon appellant's plea of true to the State's enhancement allegations, the jury assessed punishment at forty-seven years and six months confinement in the Texas Department of Corrections and a fine of $60,000.00.

On appeal, the Fort Worth Court of Appeals affirmed appellant's conviction in a published opinion. Reeves v. State, 743 S.W.2d 362 (Tex.App. -- Fort Worth 1987). After originally denying appellant's petition for discretionary review, we granted appellant's motion for rehearing to determine whether the court of appeals erred in holding that the evidence was sufficient to prove the delivery of over 28 grams of amphetamine. See Tex.R.App.Pro. 200 (c) (2). We will reverse.

The indictment in the present case alleged that appellant on or about November 26, 1985, "intentionally and knowingly deliver[ed] to J. E. Lee a controlled substance, namely: amphetamine of more than twenty-eight grams, but less than four-hundred grams by actually transferring said controlled substance." Since appellant

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[1] The Controlled Substances Act is now listed under the Health and Safety Code, Chapter 481. See V.T.C.A. Health and Safety Code, Sec. 481.103 and Sec. 481.113.

asserts insufficiency of the evidence, a brief recitation of the pertinent facts is in order.

The testimony at trial demonstrated that for several months prior to his arrest, appellant had been under surveillance by undercover narcotics officers of the Fort Worth and Arlington Police Departments. While operating in an undercover capacity, officers Joseph E. Lee and Ed Featherston made several contacts with appellant and arranged to purchase from appellant some amphetamine or "speed". On the day of appellant's arrest, Lee and Featherston went to appellant's residence to make the purchase. Officer Lee testified that he and appellant went inside appellant's house while Featherston waited outside. While inside, Lee told appellant that he and Featherston had in their car various items used in the process of manufacturing speed and that they were willing to trade the items for two ounces of speed.[2] Appellant told Lee that he had a quantity of "wet" speed available for sale, and that if Lee found that it weighed less than two grams when it dried out, then appellant would make up the difference the following day. Lee testified that he accepted appellant's offer. Lee then went outside to where Featherston was waiting, and both officers then returned to the house with the items. At that time, appellant handed Lee a small plastic sandwich bag containing a "white wet powdery type substance." Lee placed the bag in his pocket, and he and Featherston then left the residence. Approximately thirty to forty-five minutes later, Lee, Featherston and several other police officers returned with a search warrant. Upon execution of the warrant, appellant was arrested and the items used in the transaction were seized.

Frank Shiller, director of the Fort Worth Police Department Crime Laboratory, testified that he performed tests on the substance delivered by appellant to Officer Lee and determined that the entire contents of the plastic bag weighed 29.7600 grams.

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[2] Included in these items were approximately thirteen pounds of phenylacetic acid, a main precursor used to make amphetamine; various pieces of glassware commonly used in clandestine amphetamine labs; and a 22-milliliter heating mantle used to handle flasks during the manufacturing process.

Shiller further testified that based on his experience and the results of tests he performed on the substance, in his opinion, the material contained amphetamine. However, Shiller also stated that the exact percentage of amphetamine within the material was not determined. Shiller did not testify, furthermore, as to the nature of any other substances in the material besides amphetamine.

Appellant claimed on appeal to the court of appeals that this evidence was insufficient to prove guilt beyond a reasonable doubt. Based on a court of appeals decision in Cruse v. State, 722 S.W.2d 778 (Tex.App. -- Beaumont 1986), appellant argued that because the indictment alleged that he delivered "amphetamine of more than 28 grams but less than 400 grams," the State was required to prove that the amount of pure amphetamine was more than 28 grams but less than 400 grams. In *Cruse*, the appellant was indicted for "intentionally and knowingly possess[ing] a controlled substance, namely: METHAMPHETAMINE of more than twenty-eight grams but less than four hundred grams." The Beaumont court of appeals held that an instructed verdict should have been granted to appellant because the state did not prove beyond a reasonable doubt that the methamphetamine weighed more than 28 grams. The evidence revealed that the contents of a cup which was seized weighed 42.17 grams and contained some amount of methamphetamine, but the amount of actual methamphetamine present within that 42.17 grams of substance was not determined. The majority in *Cruse* held:

> "Here, the indictment alleges the methamphetamine to be of more than 28 grams. It does not use the phrase "including its adulterants and dilutants". The state is bound by the allegations in its indictment and must prove them beyond a reasonable doubt."

Cruse, 722 S.W.2d at 780.

The court of appeals in the present case expressly rejected appellant's argument and implicitly disagreed with the holding in *Cruse*. In its reasoning, the court of appeals held that the language

of Article 4476-15, Section 4.031(c), see fn. 1, *ante*, broadened the definition of "controlled substance" to include adulterants and dilutants; therefore, when the State alleges an offense under Section 4.031(c), the use of the term "controlled substance" encompasses adulterants and dilutants for purposes of determining the weight alleged. Thus, the court of appeals held that the proof adduced at trial did not vary from the indictment, and the evidence was sufficient to support a finding that appellant delivered more than 28 grams of amphetamine, including adulterants and dilutants. *Reeves*, 743 S.W.2d at 363. We disagree with the above reasoning.

The Texas Controlled Substances Act, Article 4476-15, provides the framework for regulating certain "controlled substances" which are defined within the Act as "drug[s], substance[s], or immediate precursor[s] listed in Schedules I through V or Penalty Groups 1 through 4 of this Act." Sec. 1.02 (4). Subchapter 4 of the Act classifies offenses and punishment according to four "penalty groups," each of which contains certain listed controlled substances.

Section 4.031 describes the offense and punishment for the unlawful manufacture or delivery of controlled substances in Penalty Group 2, in which amphetamine is listed. Section 4.031 (a) specifically provides:

> "Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers, or possesses with the intent to deliver a controlled substance listed in Penalty Group 2."

An offense under Section 4.031(a) is a felony of the second degree. Sec. 4. 031(b).

Section 4.031(c) provides:

> "A person commits an aggravated offense if the person commits an offense under subsection (a) of this section and the amount of the controlled substance manufactured, delivered, or possessed with the intent to manufacture or deliver is, by aggregate weight, including

any adulterants or dilutants, 28 grams or more".

The punishment for an aggravated offense is 5 to 99 years and a fine of not more than $50,000.00 if the aggregate weight, including any adulterants or dilutants, is more than 28 grams but less than 400 grams. Sec. 4.031(d) (1).

In McGlothlin v. State, 749 S.W. 2d 856 (Tex.Cr.App. 1988), we held that the terms "adulterants" and "dilutants" refer specifically to compounds, substances or solutions added to the controlled substance with the intent to increase the bulk or quantity of the final product. *Id.*, at 858-59. Furthermore, where the State attempts to obtain a conviction for an aggravated offense under the theory that the aggregate weight of the controlled substance, including adulterants or dilutants, is over 28 grams, the State first must prove the existence of any adulterants or dilutants, i.e., compounds, substances, or solutions added to the controlled substance to increase the bulk or quantity of the final product. The State must then show that the controlled substance, plus any adulterants or dilutants, if proven to exist, weighs more than 28 grams. *McGlothlin*, 749 S.W.2d at 861; Engelking v. State, 750 S.W.2d 213 (Tex.Cr.App. 1988); Sloan v. State, 750 S.W.2d 788 (Tex.Cr.App. 1988).[3]

In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Butler v. State, 769 S.W.2d 234, 239 (Tex.Cr.App. 1989). As we stated in *Butler*:

> We must take each case and review the entire body of evidence to determine whether the State has proven beyond a reasonable doubt each and every element of the

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[3] *McGlothlin* implicitly rejects the court of appeals' holding in this case that the term "controlled substance" as alleged in the indictment necessarily includes "adulterants and dilutants." See discussion, p.8, *infra*.

> alleged crime and not just a plausible explanation of the crime.

Butler, 769 S.W. 2d at 239.

Furthermore, this standard must be applied to the evidence and to a correct charge that corresponds to the indictment allegations. Benson v. State, 661 S.W.2d 708 (Tex.Cr.App. 1982), reh'g denied; Boozer v. State, 717 S.W.2d 608 (Tex.Cr.App. 1984), reh'g denied. In *Benson*, we stated:

> There is an interaction between the indictment, proof and charge. The State shapes the indictment to charge a defendant with a particular offense. They then seek to prove all the elements of that offense. The next step is a sort of "codification" of the State's theory of prosecution, the particular statutory elements together with definitions, instructions, and defenses. The charge comprises these.

Benson, 661 S.W.2d at 715.

As noted earlier, the indictment in the present case alleged that appellant

> "intentionally and knowing deliver[ed] to J. E. Lee a controlled substance, namely: amphetamine of more than twenty-eight grams, but less than four-hundred grams, by actually transferring said controlled substance."

After presentment of the evidence at trial, the jury was then authorized by the trial court's instructions to convict appellant only upon finding from the evidence beyond a reasonable doubt that he did,

> "intentionally or knowingly deliver to J. E. Lee a controlled substance, namely: amphetamine of more than twenty-eight grams but less than four-hundred grams by actually transferring said controlled substance, as alleged in the indictment . . ."

The language of the above application paragraph of the court's charge mirrored the indictment; however, in the abstract portion of the court's charge, the trial judge further "defined" the weight of the controlled substance as follows: "[t]he weight of amphetamine is determined by its aggregate weight, including any adulterants or dilutants, if any." This served to complete the description of the aggravating element of Sec. 4.031(c) under which appellant was indicted. Therefore, the indictment alleged that the weight of the controlled substance was more than 28 but less than 400 grams, while the court's charge authorized conviction under a different theory by allowing any adulterants and dilutants to be considered in determining the weight.[4]

Under either theory of culpability, however, we find the evidence insufficient. As stated previously, Frank Shiller testified that while the entire contents of the plastic bag weighed 29.7600 grams, he had no opinion as to how much of it was amphetamine. On direct examination by the prosecutor, Shiller testified as follows:

> PROSECUTOR: First question, Mr. Shiller, is: How much did the contents of the package weigh?
>
> SHILLER: On weighing the contents of [the plastic bag], I determined the material to weigh 29.7600 grams.
>
> • • •
>
> PROSECUTOR: And did you do a chemical analysis of the chemical nature of that substance?
>
> SHILLER: Yes, sir. I performed a test. It was an instrument procedure involving the infrared spectrophotometer.

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[4] There was no motion to quash the indictment alleging, for instance, that an offense under Sec. 4.031(a) could become an aggravated offense under Sec. 4.031(c) under several theories of culpability and that the defendant required notice from the State as to which theory it would use to seek conviction. Furthermore, there was no objection to the court's charge on the ground, for instance, that the charge incorporated a theory of culpability not supported by the indictment. Thus we do not address the propriety of the court's charge to the jury.

PROSECUTOR: And as a result of your experience and the readings that you got as a result of that analysis, did you make a determination as to the nature of that substance?

SHILLER: Yes, sir. Based on the testing I performed, it's my opinion that the material contained amphetamine.

PROSECUTOR: In excess of 28 grams?

SHILLER: Yes, sir.

Thus, at first glance, it would appear that Shiller determined that the amount of amphetamine within the material was in excess of 28 grams; however, on cross-examination by defense counsel, Shiller further testified:

DEFENSE COUNSEL: Okay. Did you determine what percentage of amphetamine was contained in the [plastic bag]?

SHILLER: No, sir, no quantitative estimation or analysis was performed on this material.

DEFENSE COUNSEL: Was one, in fact, requested?

SHILLER: No.

• • •

DEFENSE COUNSEL: Why don't you determine the percentage of amphetamine in a particular substance?

SHILLER: The caseload would be the reason, the essential reason why we don't, because in doing a quantitative testing procedure, quite a bit of time is expended.

DEFENSE COUNSEL: So you would not have an opinion based on any test as to whether or not we're talking about one percent amphetamine or 97 percent amphetamine?

SHILLER: Not having done a quantitative estimation, I

don't have any opinion about the quantity.

• • •

DEFENSE COUNSEL: What type of tests and what period of time would it take to determine the percentage of amphetamine in [the plastic bag]?

SHILLER: Everything is set up, the standards are available and the instrumentation is set up, it could be done within an hour's time.

DEFENSE COUNSEL: For purposes of determining the weight of a substance for presentation as evidence in court, you weigh any precursor that might be still in there or any adulterants that might be added or anything that's contained in that substance; is that correct?

SHILLER: It's weighed collectively as received.

DEFENSE COUNSEL: So -- but could you, in fact, determine the amount of amphetamine by weight contained in [the plastic bag]?

SHILLER: Yes.

DEFENSE COUNSEL: But based on what you have done, you have no opinion as to that?

SHILLER: I don't have an opinion.

DEFENSE COUNSEL: Could be one percent, could be 99 percent?

SHILLER: I don't know what it is.

DEFENSE COUNSEL: But it could be at either end of the scale, could it not, by weight and by percentage?

SHILLER: Yes.

Therefore, the evidence does not establish that the amount of pure amphetamine was over 28 grams. Furthermore, the record is absent any evidence as to the identity of the other substances in the

plastic bag. Absent facts to show that the remainder of the material consisted of substances intended to increase the bulk or quantity of the final product, amphetamine, it cannot be said that the remainder was an adulterant or dilutant. *McGlothlin*, 749 S.W.2d at 861; *Engelking*, 750 S.W.2d at 217; *Sloan*, 750 S.W.2d at 789. Consequently, the evidence is insufficient to show that the aggregate weight of the controlled substance, including any adulterants or dilutants, was over 28 grams.

In response to the reasoning of the court of appeals below and the argument by the State that the use of the term "controlled substance" in the indictment, and presumably the charge, necessarily includes adulterants and dilutants because of the wording of Sec. 4.031(c), we find such an interpretation much too broad. Sec. 4.031(c) does not "define" a "controlled substance"; it describes an offense, and the language "if . . . the amount of the controlled substance . . . is, by aggregate weight, including any adulterants or dilutants, 28 grams or more" simply instructs as to how the weight of a controlled substance may be determined for purposes of establishing the aggravating element of that offense. As we stated previously, adulterants and dilutants are substances added to a controlled substance to increase the bulk or quantity of the controlled substance in its final form. *McGlothlin*, 749 S.W.2d at 860. Therefore, the term "controlled substance" does not necessarily include adulterants and dilutants.[5]

We hold that the evidence is insufficient to show that appellant delivered amphetamine of more than 28 grams, but less than 400 grams. Therefore, the judgment of the trial court and the

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[5] Although neither appellant nor the State raises the point in their arguments, we are aware that the manufacture or delivery of the controlled substance "amphetamine" in particular poses additional considerations because of the way in which amphetamine is listed in the Controlled Substances Act. Section 1.02(4) defines "controlled substance" as "a drug, substance, or immediate precursor listed in Schedules I through V or Penalty Groups 1 through 4 of this Act." Section 4.02(c) covers Penalty Group 2 controlled substances and lists as

court of appeals is reversed, and this cause is remanded to the trial court with instructions to enter a judgment of acquittal as to the offense of delivery of amphetamine of more than 28 grams but less than 400 grams.

Miller, J.

Clinton, J. concurs in the result.
McCormick, P.J., and Berchelmann, J. dissent.
Delivered: September 12, 1990
En Banc
Publish

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prohibited " . . . . *a material, compound, mixture, or preparation which contains any quantity of the following substances* having a potential for abuse associated with a depressant or stimulant effect on the central nervous system: *Amphetamine*, its salts, optical isomers, and salts of optical isomers; . . . . " Section 4.02(c) (3) (emphasis added).

From the wording of this provision, the "controlled substance" prohibited may be: a) a material, compound, mixture, or preparation which contains any amount of a listed substance (e.g., amphetamine); or b) the listed substance in its "pure" form, since a "material" could consist of 100 percent of the listed substance. The distinction becomes important when the State seeks conviction for an aggravated offense under Sec. 4.031(c).

Where a material, compound, mixture, or preparation contains some quantity of a listed controlled substance, e.g., amphetamine, the "controlled substance" is that material, according to the statute. Section 4.02(c) (3). In that case, if the weight of the material is over 28 grams, then the aggravating element of Sec. 4.031(c) is met. On the other hand, the State may seek conviction under Sec. 4.031(c) for possessing, manufacturing, or delivering the "pure" substance, e.g., "pure" amphetamine. In that case, as we discussed previously, the State must prove either that the amount of the pure amphetamine weighs more than 28 grams or that the amount of pure amphetamine, plus any adulterants or dilutants, if proven to exist, weighs more than 28 grams.

The evidence in this case did show that appellant delivered a "material, compound, mixture, or preparation" containing some amount of amphetamine, and that the material weighed more than 28 grams. However, the charge to the jury did not allow a conviction under that theory, nor was appellant ever indicted under such an allegation.

IN THE COURT OF APPEALS FOR THE SECOND COURT OF APPEALS DISTRICT OF TEXAS

CRAIG WILLIAM REEVES

V. No. 2-87-012-CR

THE STATE OF TEXAS

Delivered December 31, 1987

OPINION

HILL, Justice.

Craig William Reeves appeals from his conviction by a jury of the offense of aggravated delivery of a controlled substance, amphetamine of more than twenty-eight but less than four hundred grams. Upon Reeves' plea of true, the jury found that the State's enhancement allegations were true and assessed Reeves' punishment at forty-seven years and six months in the Texas Department of Corrections and a fine of $60,000.00. In three points of error, Reeves urges that the evidence is insufficient since it does not establish that the amount of amphetamine, excluding adulterants or dilutants, is more than twenty-eight grams, and that the trial court erred in denying a mistrial after a prosecution witness injected an extraneous offense into the trial.

We affirm, because we find that the evidence is sufficient to establish that Reeves delivered amphetamine in excess of twenty-eight grams, and because we find that any harm in the testimony of which Reeves complains was cured by the trial court's action sustaining Reeves' objection and instructing the jury to disregard the testimony.

Reeves asserts in point of error number one that the evidence is insufficient to support his conviction, because the evidence does not reflect that he delivered more than twenty-eight grams of amphetamine, excluding adulterants or dilutants.

The testimony reflected that Reeves delivered to a police officer a substance weighing 29.7600 grams. The substance contained amphetamine, but the exact percentage was not determined. Article 4476-15, section 4.03(c) provides that:

> (c) A person commits an aggravated offense if the person commits an offense under Subsection (a) of this section and the amount of the controlled substance manufactured, delivered, or possessed with intent to manufacture or deliver is, by aggregate weight, including any adulterants or dilutants, 28 grams or more.

TEX.REV.CIV.STAT.ANN. art. 4476-15, sec. 4.03(c) (Vernon Supp.1988). Under the provisions of this section, in determining the weight of the controlled substance, for the purpose of determining whether or not the offense is aggravated, the aggregate weight is to include any adulterants or dilutants. The State alleged that the controlled substance, amphetamine, was more than twenty-eight grams, but less than four hundred grams. For the purpose of the Controlled Substances Act, "[c]ontrolled substance" means "a drug, substance, or immediate precusor listed in Schedules I through V or Penalty Groups 1 through 4 of this Act." TEX.REV.CIV.STAT.ANN. art 4476-15, sec. 1.02(4) (Vernon Supp.1988). However, in section 4.03(c) the term is expressly broadened to include adulterants and dilutants. Accordingly, in an indictment for aggravated delivery of a controlled substance pursuant to section 4.03(c), the use of the term "controlled substance" includes adulterants and dilutants. There is therefore no variance between the allegations in the indictment and the proof presented. *Id.*

Reeves relies on the case of *Cruse v. State*, 722 S.W.2d 778 (Tex.App.--Beaumont 1986, pet. ref'd). In *Cruse*, the court held that the evidence was insufficient to prove the allegations of the indictment because the State had not proved its allegation that the controlled substance weighed more than twenty-eight grams. The court pointed out that the indictment did not limit the term

"controlled substance" by the phrase "including its adulterants and dilutants." *Id.* at 780. As we have previously stated, the use of the phrase in the indictment is not necessary because it is apparent from section 4.03(c) of article 4476-15 that the term "controlled substance," as used in the context of that section, includes adulterants and dilutants. Given the context of that section, the state alleged, in effect, that Reeves delivered amphetamine, including adulterants and dilutants, in excess of twenty-eight grams, but less than four hundred grams. The State proved those facts. We hold that the evidence is sufficient to support the conviction. We overrule point of error number one.

In two additional points of error, Reeves complains that the trial court erred by denying him a mistrial based on references by a State's witness to an extraneous offense. In each instance the trial court sustained his objection and instructed the jury to disregard the testimony. We have considered both points and find that harm, if any, was cured by the trial court's action in sustaining Reeves' objections and instructing the jury to disregard the testimony. *See Davis v. State*, 642 S.W.2d 510, 512 (Tex.Crim.App.1982). We overrule points of error numbers two and three.

The judgment is affirmed.

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

CRAIG WILLIAM REEVES

V. No. 249-88

THE STATE OF TEXAS

January 30, 1991

On this day the State's Motion for Rehearing was denied. Presiding Judge McCormick would grant. Mandate is stayed for a period of 90 days. Mandate is due to issue on 4-30-91.

IN THE COURT OF APPEALS
FOR THE SECOND COURT OF APPEALS
DISTRICT OF TEXAS

CRAIG WILLIAM REEVES

V. No. 2-87-012-CR

THE STATE OF TEXAS

February 4, 1988

ORDER

On this day came on to be considered the motion of appellant for rehearing.

It is the opinion of this Court that such motion should be and is hereby overruled. It is the order of this Court that the opinion and judgment of December 31, 1987 stands unchanged.

The Clerk of this Court is directed to transmit a copy of this order to the attorneys of record.

It is so ordered.

SIGNED THIS 4th day of February, 1988.

/s/John G. Hill

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

CRAIG WILLIAM REEVES

V. No. 249-88

THE STATE OF TEXAS

STATE'S MOTION FOR REHEARING,
AND ALTERNATIVELY,
MOTION TO STAY MANDATE PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI

[EXCERPTS]

TO THE COURT OF CRIMINAL APPEALS:

SUMMARY OF STATE'S CONTENTIONS ON REHEARING

1. The Court erred in weighing the evidence against a theoretically correct jury charge rather than against the charge the jury actually relied on in reaching its verdict. Under the jury charge actually given, the evidence was sufficient. If there is reversible error in this case, it would be because of errors in the jury charge -- either an expansion beyond the theory of "pure amphetamine" to which the Court believes the State was limited by the indictment or by a failure to properly define "adulterants and dilutants." If these charging errors exist, they are mere "trial errors" which can be remedied by reversing and remanding for new trial, not awarding an acquittal for insufficient evidence.

2. The Court has violated *Jackson v. Virginia* in two significant respects.

(a) First, *Jackson* requires, as a general rule, that the sufficiency of the evidence be judged against the theory of criminal liability *actually submitted to the jury in the charge*, not against the charge that should have been submitted. The Court should not, as part of its sufficiency

> review, require that a certain amount of pure amphetamine be proved; that theory was not presented to the jury. Similarly, to the extent the Court adverted to the jury instructions actually given, the Court erred in applying the technical *McGlothlin-Engelking* definition of "adulterants and dilutants" since that definition had not been given to the jury and indeed had not even been explicated by the appellate courts at the time of trial. The Court should have judged sufficiency solely in light of the instructions actually given and should therefore weigh sufficiency against the meaning a lay jury could reasonably have given the terms in the instructions. Had the evidence been weighed against the instructions as the jury would have understood them, the Court would have found the evidence more than adequate.
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> . . . .

[State's motion for rehearing, pp. 1-2. The extended discussion of this point appears at pp. 6-21 of the motion for rehearing.]

IN THE 213TH
DISTRICT COURT
TARRANT COUNTY, TEXAS

THE STATE OF TEXAS

VS. NO. 0270051D

CRAIG WILLIAM REEVES

[EXCERPTS FROM JURY INSTRUCTIONS]

. . . .

Our law provides that a person commits an offense if he intentionally or knowingly delivers a controlled substance.

Amphetamine is a controlled substance.

The weight of the amphetamine is determined by its aggregate weight including any adulterants or dilutants, if any.

. . . .

Now, if you find from the evidence beyond a reasonable doubt that on or about the 26th day of November, 1985, in Tarrant County, Texas, the defendant, Craig William Reeves, did intentionally or knowingly deliver to J. E. Lee a controlled substance, namely: amphetamine of more than twenty-eight grams but less than four-hundred grams by actually transferring said controlled substance, as alleged in the indictment, then you will find the defendant guilty as charged.

[R. I-25,27.]

[EXCERPTS FROM CLOSING ARGUMENT]

[PROSECUTOR] What did he deliver?

It's an item contained in State's Exhibit No. 1 that was sealed in a plastic package, sealed in a paper package, submitted to the Crime Lab, opened by the Crime Lab, closed by them, kept sealed at all times except when it was being tested, and Frank Shiller, the chief of that Crime Lab, testified to you that this is amphetamine and you were told by definition that amphetamine is a controlled substance, so it doesn't matter as far as weight. You don't have to separate out what is pure amphetamine.

The definition tells you that it's its aggregate weight, including dilutants and adulterants, so this has meth -- I'm sorry -- this has amphetamine in it. The weight that is determined that is important for criminal law is the entire weight of this package, and you heard what that weight was, 29 plus grams; 30 plus grams before it was tested, 29 plus grams after that and before it was re-tested.

Is there any doubt in your mind that what this Defendant reached into his pocket and pulled out and handed to J. E. Lee is amphetamine of more than 28 grams?

I submit to you there is no such reasonable doubt.

[R. IV-237-38.]